STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 28-94:

ROY EDUCATION ASSOCIATION, MEA/NEA,	)	
Complainant,	)	
vs.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
ROY ELEMENTARY & HIGH SCHOOL DISTRICT NO. 74,	)	AND RECOMMENDED ORDER
Defendant.	)	

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I. **INTRODUCTION**

On November 10, 1993 the Roy Education Association filed this unfair labor practice charge against Roy Elementary and High School District No. 74 alleging a violation of Section 39-31-401(1) and (3), MCA. This section of the statute provides it is an unfair labor practice for a public employer to: "(1)interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;" or "discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization; . . ."

The complaint alleges that the district selectively implemented a reduction in force and/or nonrenewal of

officers of the Roy Education Association. In addition, the district is accused of assigning Alice Green multiple classes in one period and other selective actions against Association officers without legitimate and substantial business reasons.

On January 26, 1994, the Association filed an amended complaint in which it further alleged that the district violated the statute by refusing to speak with union officers directly to schedule negotiations and by assigning classes and subjects to other teachers rather than to union officers more qualified to teach and oversee the classes and subjects.

The administrative hearing was conducted in this matter on July 13, 1994 in Lewistown, Montana. The Complainant was represented by its counsel, J. Dennis Moreen. Michael Dahlem, Staff Attorney for the Montana School Boards Associastion, represented the Defendant. The hearing was recessed and continued on July 14 and July 27, 1994 in Helena, Montana, for the purpose of obtaining additional witness testimony. At the conclusion of the hearing, the parties agreed to submit proposed findings of fact, conclusions of law and a recommended order on September 16, 1994. Response briefs were scheduled, and final brief was filed on October 14, 1994.

II. **ISSUES**

Did Roy Elementary and High School District No. 74 violate Section 39-31-401(1) and (3), MCA by deciding, without any legitimate and substantial business reason, to (1) selectively implement a reduction in force and/or nonrenewal of officers of the Roy Education Association; (2) assign Alice Green multiple classes in one period; (3) refuse to speak with union officers directly to schedule negotiations; and (4) assign classes and subjects to other teachers rather than to union officers more qualified to teach and oversee the classes and subjects? Were any of these actions, if established, inherently destructive of the employees' rights of self-organization? III.

FINDINGS OF FACT[1]

1. Roy High School is one of the smallest high school districts in the state of Montana. During the 1992-93 school year, there were only 12 high school students enrolled at Roy and six teachers employed to teach 18

[1] All proposed findings, conclusions and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions may have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

junior high and high school students during the 1992-93 school year. (Knodel testimony, tape 7.)

2. In the spring of 1993, district superintendent Harry Knodel projected an enrollment of 6-10 students in the high school for the 1993-94 school year. (Knodel testimony)

3. Alice Green is employed as a tenured teacher with Roy School District No. 74 and is endorsed in business education and mathematics. (Green testimony, tape 3; Exhibit C-8.)

4. Green has served as president of the Roy Education Association (REA) since the 1992-93 school year. (Green testimony, tape 3.)

5. During the 1992-93 school year, Green taught advanced math, pre-algebra, 7th and 8th grade math, algebra I and II, typing and consumer math. (Green testimony, tape 5; Exhibit D-3, page 2.)
(Knodel testimony, tape 7; Exhibit D-3, page 2).

6. Because of on-going problems with low and declining enrollment, discussion of possible staff reductions in the high school began in October, 1992. (Kyle Grimsrud [Chairman Roy School Board] testimony, tape 2; Exhibit D-2).

7. By letter dated December 9, 1992, James Lubke and Mrs. Green, the designated negotiating team for the REA, requested negotiations with the Board. Their request set out a list of items the union wanted to negotiate, and requested that a date be set for negotiations. (Exhibit C-19, Testimony Green, Lubke and Grimsrud)

8. A meeting was indeed held between the Board and the team of Green and Lubke wherein they "went over" the items which were listed on the December 9th agenda. The Board advised them they would meet at a later date. (Exhibit C-1 and Testimony Green and Lubke)

9. The school board subsequently discussed possible staff reductions at its January 13, 1993 and February 9, 1993 meetings. The possible reductions included many positions, including that of the superintendent. (Knodel testimony, tape 7, Exhibit C-6; Exhibit D-5.)

10. Being concerned about the potential for reduction in force (RIF) being initiated by the Board, and being referred to grievance procedures and RIF policy, Green requested opportunity to copy the Board's policy book, and Keller made the policy book available to Green to be copied. (Grimsrud testimony, tape 1; Green testimony, tape 3; Keller testimony, tape 5 and Exhibit C-1) 11.

Subsequently, Keller needed the policy book returned

to make appropriate changes for a final edition, and after one week he requested it be returned, but made it available to Green in the secretary's office. (Keller testimony, tapes 5 and 6.)8.

12. Knodel's recommendations to the Board in January 1993, were made based on projections of low and declining enrollment and the need for fiscal responsibility. His credible testimony revealed that union status of any employee was not a factor in his recommendations. (Knodel testimony, tape 7 and Exhibit D-5)

13. On February 24, 1993 the board of trustees voted to reduce or terminate teaching positions and to cut classified employee hours by 25% across the board in response to the recommendations made by the superintendent. The Board voted to reduce the kindergarten/reading position to one half time or combine with the first grade. This position was held by Ms. Kolstad. The Mathematics/Business position was reduced to three seventh time. This position was held by Mrs. Green. The English/Librarian position was reduced to three seventh time. Mrs. Walker was employed in that position. The Physical Education/Industrial Arts position was eliminated. Mr. Lubke was employed in that position. (Grimsrud, Green and Lubke testimony, Exhibit C-6).

14. While some of the classified reductions were temporary, Board chairman Gary Keller testified that one part-time janitor's position was permanently eliminated. (Keller testimony, tape 5.)

15. Keller explained that former teacher Rene Kolstad was offered a teaching contract after being informed of her layoff because the school board rescinded an earlier decision to combine positions and by board policy she was entitled to be offered the position. Kolstad declined the offer of employment. (Keller testimony, tape 5.)

16. Former REA vice-president James Lubke stated that he never appealed the school board's decision to eliminate his teaching position because of declining enrollment even though state law permits a non-tenured teacher to file an appeal if the teacher believes that the reason stated is untrue. (Lubke testimony, tape 3; Section 20-4-206, MCA).

17. Board member, and former chairman, Kyle Grimsrud stated that, with the exception of Alice Green, he did not know who the REA officers were **at the time** staff reductions were made, and the Board never discussed the union membership of any employee of the district. (Grimsrud testimony, tape 1 and 2.)

18. Alice Green admitted that she did not communicate the names of the union officers to the Board, nor inform

the Board that she was the exclusive representative of the REA. Furthermore, no documentary evidence on record identifies any union officer by title with the exception of Alice Green. (See Green testimony, tape 4 and 5)

19. Although Lubke stated that he informed Grimsrud and board member Rex Murnion of the names of the union officers, Grimsrud did not recall any such conversation taking place. In all events, Grimsrud was aware of Green's position with the REA. (Lubke testimony, tape 3; Grimsrud testimony, tape 5.)

20. The record does reflect that Grimsrud failed to return business phone messages from Green left at his home, but both Green's and Grimsrud's memories of the phone calls had dimmed over time. Nevertheless, Green was never **denied** opportunity to speak to the Board, albeit Board chairman Grimsrud's actions reflected his preference to discuss certain pertinent matters with REA representative Lubke. Lubke maintained contact with Grimsrud and had informed Grimsrud the Board could contact him about scheduling negotiation sessions. (Testimony Green, Grimsrud and Lubke)

21. Although Grimsrud did not speak with Lubke on the telephone, he met with him informally at school or in town where they would discuss the scheduling of bargaining

sessions. Moreover, Lubke had informed Grimsrud to contact either Green or himself concerning REA matters. Grimsrud was never asked to deal exclusively with Green. (Testimony Grimsrud and Lubke- tapes 1, 2, 3 and 5.)

22. Although Lubke and Green claim that the school board "ignored" Green at a meeting on March 10, 1993, Lubke stated that he never asked the board to direct its questions to Green. Nor does the record reflect that Green made any concerted effort to obtain the attention of the Board at the meeting. (Lubke testimony, tapes 2 and 3.)

23. Other than the March 10, 1993 board meeting, Green did not identify any other occasions on which she felt she was ignored by the board of trustees. She typically just sat at board meetings and didn't ask any questions. (Green testimony, tape 4.)

24. Although Green asserts throughout that Grimsrud essentially ignored her calls, requests, etc., he did sign a "grant" request that was prepared by Alice Green for his approval. (Grimsrud testimony, tape 5.)

25. During an informal conversation with Superintendent Knodel on March 11, 1993, Green was advised her new schedule would be set up to be more accommodating to her and would be set for the first, third and last period of the school day. Knodel's credible testimony

indicated he never intended any threat from that conversation, but merely giving his overview of the coming RIF actions being undertaken by the Board. (Testimony Knodel)

26. Although Green stated that she somehow felt threatened by comments made by superintendent Knodel on March 11, 1993, her fears were certainly never realized, as no adverse action was ever proposed by either Knodel or the Board. Green did not have her assigned courses spread throughout the day and, in fact, had her hours increased in September, 1993. (Green testimony, tape 3; Exhibit C-6.)24.

27. The REA and the school board held only two bargaining sessions before the REA asked MEA Uni-Serve Director Jane Fields to attend a session on March 16, 1993. Prior to that meeting, the union had never even submitted a written proposal to the school board, and Lubke admitted that the Board never refused to bargain with the REA. He and Green merely complained that little progress was made during the first two bargaining sessions. (Lubke testimony, tapes 2 and 3; Green testimony, tapes 3 and 4; Fields testimony, tape 8.)

28. The Roy School Board and the Roy Education Association reached a tentative agreement on a new

collective bargaining agreement on July 16, 1993. The contract was ratified by the school board on August 9, 1993. During the course of negotiations, the Roy Education Association never requested mediation, nor did it file an unfair labor practice charge alleging a refusal by the board to bargain in good faith. (Lubke testimony, tapes 2 and 3; Green testimony, tape 4; Fields testimony, tape 8.)

29. Most teachers at Roy have been assigned multiple subject classes and former superintendent Bewick described the schedule of Kathryn Kennedy as an example of multiple subjects being taught in a single class period. During the 7th period last school year, Kennedy taught Band 7/8, Band 9/12 and Elementary Band 5/6. Each of these assignments represents a different subject for which specific preparation is required. (Bewick testimony, tape 6 and Exhibit C-7)

30. Bewick also stated that English 9/10 represents two separate subjects in which students work on different assignments. He stated that, in terms of preparation, there is no significant difference in teaching English 9/10 and Math 7/8. (Bewick testimony, tape 6.)

31. In one of the periods in which Alice Green taught three separate subjects during the 1993-94 school year, one of the subjects was pre-algebra taught to an advanced 8th

grade student. Green was not required to teach this subject, but accepted it voluntarily. (Green testimony, tape 4; Bewick testimony, tape 6.)

32. Green acknowledged that she had been routinely assigned two subjects in one class period in the past. During the 1992-93 school year, she had been assigned three subjects in one period. Prior to September, 1993, however, she had never made any complaint to the school board about her teaching assignment. (Grimsrud testimony, tape 2; Green testimony, tape 5; Fields testimony, tape 8.)

33. Although Green taught eight subjects in 1992-93, she had only 15 students in those classes. In 1993-94 she taught 17 students in seven subjects. She explained that multiple subject assignments are more common in her field of mathematics because it is harder to teach those courses every other year. She felt it might be feasible to teach Government one year and American History the next, however, because all students need Algebra I, II and Geometry in order to take Advanced Math, it is necessary to offer more math subjects each year. (Green testimony, tape 5.)

34. Green claims that she was qualified to oversee an Edunet course assigned to Gaskell during his 2nd period, when he was also assigned Independent Study and Biology. The record reflects, however that Green last taught

computer science during the 1986-87 school year and last took a computer science course in 1991 or 1992. (Bewick testimony, tape 6; Green testimony, tape 5 and Exhibit C-7.)

35. Although no computer science course was offered during the 1993-94 school year, Bewick stated that he would have assigned the course to William Gaskill rather than to Green because of Gaskill's superior qualifications, experience and credentials. Gaskill had been instrumental in placing computers into the Roy schools. (Bewick testimony)

36. Bewick assigned Survival Skills to Gaskell rather than to Green because of Gaskell's counseling experience. He deemed the counseling needs of the students very important in teaching the course, and Gaskell's background experience in counseling would compliment the overall needs of the students. (Bewick testimony, tapes 6 and 7.)

37. Bewick also recommended that Alice Green's hours be **increased** because a higher than expected enrollment prevented her from giving sufficient attention to the students in her classes. Thereafter, on September 23, 1994, superintendent Bewick presented the board with several options regarding Alice Green's schedule for the

1993-94 school year. He made no specific recommendations and it was the Board who chose to increase Green's hours from 3/7 to 5/7 time. (Grimsrud testimony, tape 2; Bewick testimony, tape 6.)

38. The Board may have appeared "upset" with Bewick's recommendation, but their concern was the additional cost had not been included in the budget. (Bewick testimony, tape 6.)

39. Alice Green was given the option of spreading seven subjects over five periods with no preparation period or over four periods with a preparation period. Nothing in the record indicates granting such option to Green was other than an act of good will by the Board in allowing her some flexibility with her schedule. By her own choice then, Green selected the four period option. (Bewick testimony, tape 6.)

40. Bewick convincingly testified that Green's status as REA president was not a factor in any decision or recommendation he made while employed as superintendent. And, neither Bewick nor Knodel ever observed any board member refusing to meet, confer or discuss matters with Alice Green. (Bewick testimony; Knodel testimony, tape 7.)

41. Jane Fields, Uniserve Director, was uncontroverted in her testimony revealing she felt the

school board may have been inexperienced in dealing with the union, but that they were chiefly concerned with keeping its costs down when it made the decision to reduce staff. And, she admitted she never informed the Board that she believed the RIFs had been motivated by any anti-union animus. (Fields testimony, tape 8.)

42. Consistent with the board's concern for fiscal responsibility, teachers received no pay increase in the contract ratified on August 9, 1993. (Green testimony, tape 4.)

IV. **CONCLUSIONS OF LAW**

1. The Montana Supreme Court has approved the use of federal court and National Labor Relations Board decisions as precedent when interpreting the Montana Collective Bargaining for Public Employees Act. City of Great Falls v. Young, 211 Mont. 13, 686 P.2d 185, 119 LRRM 2682 (1984). Pursuant to Section 39-31-406, MCA, the Court has also held that a Complainant's case must be established by a preponderance of the evidence. Board of Trustees v. State of Montana, 185 Mont. 89, 604 P.2d 770, 103 LRRM 3090 (1979).

2. In Missoula County High School v. Board of Personnel Appeals, 224 Mont. 50, 727 P.2d 1327 (1986), the Montana Supreme Court articulated the criteria to be

employed when reviewing an unfair labor practice charge alleging a violation of Section 39-31-401(1) and (3), MCA. In that case, the Court held: "Under the equivalent federal statutes (29 U.S.C. Section 158(a)(1) and (3)), any violation of subsection (3) necessarily implies a derivative violation of subsection (1). [Citation omitted]. Subsection (1) 'was intended as a general definition of employer unfair labor practices. Violations of it may be either derivative, independent, or both.' [Citation omitted.]" Id. at 55.

3. Citing a United States Supreme Court decision, the Court went on to point out: "[T]he intention was to forbid only those acts that are motivated by anti-union animus...But an employer may take actions in the course of a labor dispute that present a complex of motives...and it is often difficult to identify the true motive.

"In these situations the Court has divided an employer's conduct into two classes...Some conduct is so 'inherently destructive of employee interests' that it carries with it a strong inference of impermissible motive...In such a situation, even if an employer comes forward with a nondiscriminatory explanation for its actions, the Board 'may nevertheless draw an inference of improper motive from the conduct itself and exercise its

duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'...On the other hand, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. [Citation omitted.]" Id. at 55-56.

4. With respect to the question of what acts are inherently destructive of employee interests, our Court has taken a conservative approach. In Missoula County High School, it cited a 9th Circuit Court of Appeals case in support of the following definition: "'[C]ases involving conduct with far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity. Examples of inherently destructive activity are permanent discharge for participation in union activities, granting superseniority to strike breakers, and other actions creating visible and continuing obstacles to the future exercise of employee rights. (Citation omitted.)' Portland Willamette Co. v. N.L.R.B. (9th Cir. 1976), 534 F.2d 1331, 1334. It is notable that The Portland

Willamette Co. court declined to find inherently destructive conduct in an employer's proposal, during a strike, to grant a retroactive pay increase to workers who had returned to, and remained at, work by a certain date." Id. at 58-59.

5. With regard to an employer's stated business justifications, the Court held: "We caution the Board that it is neither our function nor the Board's to second-guess business decisions.

"The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation...[Citations omitted.] To find a violation of Section 39-31-401(3), MCA, where the discriminatory conduct has comparatively slight effect, '[A]n antiunion motivation must be proved to sustain the charge if (as here) the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.'" [Citation omitted.] Id. at 57-60.

The Court addressed the issue of whether the Complainant had established an independent, as opposed to a derivative, violation as found under Section 39-31-401(1), MCA. To establish an independent violation, a Complainant must show:

(1) that employees are engaged in protected activities, (citation omitted);

(2) that the employer's conduct tend to 'interfere with, restrain, or coerce employees in those activities, (citation omitted); and

(3) that the employer's conduct is not justified by a legitimate and substantial business reason, (citation omitted).' Fun Striders, Inc., 686 F.2d at 661-662. Id. at 60.

6. Complainant cites Missoula County High School V. Board of Personnel Appeals, 224 Mont. 50, 55-56, 727 P.2d 1327 (1986) as controlling in this matter. However, in that case the Court cited Portland Willamette Co., supra, wherein the Court further held: "The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation... [Citations omitted.] To find a violation of Section 39-31-401(3), MCA, where the discriminatory conduct has comparatively slight effect, '[A]n antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.'" [Citation omitted] Id. at 57-60. And here, the overall record

supports the conclusion that Defendant acted out of legitimate and substantial business reasons.

7. As argued by Defendant, the record simply does not support Complainant's contentions that Alice Green was singled out for multiple subject assignments. In the small Roy School District, such assignments had by past practice not been an unusual happening. Further, Alice Green and other teachers carried out such assignments in the past without complaint, and given the low enrollment at Roy High School, there appears to be a legitimate and substantial business justification for multiple subject assignments.

8. As to board members or administrators intentionally ignoring or refusing to "deal" with Alice Green because of any anti-union animus, the evidence in the record does not lead to such conclusion in this matter. The Board may have been inexperienced in dealing with the Union and its representatives; and may have been more comfortable discussing matters with Lubke than with Green, but then, Lubke was vice-president of the Union and apparently had authorization to "meet and greet" and carry on discussions with board members. Furthermore, REA vice-president Lubke never asked Grimsrud to deal exclusively with Green and continued to carry on discussions with

Grimsrud both in and out of board meetings with the apparent knowledge of Green.

9. Likewise, there is insufficient evidence to substantiate the charge that former superintendent Knodel ever threatened Green. Knodel's credible testimony revealed no threats were at all intended during his discussions with Green. There is simply no evidence indicating any such alleged threats were ever carried out, but it is evident neither Green nor the REA ever brought the matter to the attention of the school board prior to the filing of this charge. It can only be concluded that Green misapprehended the essence of her conversation with Knodel.

10. With regard to the charge that classes for which Alice Green was more qualified to teach were assigned to other teachers, here again, Defendant presented substantial evidence on the record which clearly shows that the district had a legitimate and substantial business justification for assigning Survival Skills to William Gaskell. The determinate reason was Gaskell's background in counseling which the Board thought very beneficial in teaching the survival skill class. Similar justification for assigning computer science to Gaskell had the course been offered was his experience with the computer system

within Roy Schools. While it is true that Green may have been equally qualified to oversee Edunet, it is noted that this duty was assigned to Gaskell in addition to his other teaching responsibilities for the 2nd period. As pointed out by Defendant, there is nothing in the record showing that this assignment merited a separate class period, and given Green's complaints about her schedule, it is reasonable that the Board did not saddle her with the burden of another assignment. In all events, there is no evidence in the record to support the claim that any of the assignments were motivated by anti-union animus.

11. The Complainant also alleges that the employer's actions are inherently destructive of the right of self-organization and cites Sidney Education Association v. Richland County High School district No. 1 and Elementary District No.5 ULP 29-84 and American Freightways Co., 124 NLRB 146, 44 LRRM 1302 (1959). These cases are not dispositive of this matter. The Defendant has shown that the Board's actions did not hinder future bargaining, have far reaching effects, or discriminate solely upon the basis of participation by Green, Lubke, or other union representatives or members in union activity. To do so would ignore the fact that during the course of these alleged violations, the parties were able to successfully

negotiate a new collective bargaining agreement without recourse to a strike, an unfair labor practice charge or even a request for mediation.

12. Further, as to Complainant's assertions with regard to class assignments, meeting protocol and unreturned telephone calls, such actions in this matter were not shown to be inherently destructive of the right of self-organization. Here, there is no credible evidence in the record to support the claim that any employee was discharged or reduced in hours because of their membership in the Roy Education Association.

13. As argued by Defendant, with respect to the Section 39-31-401(1), MCA charge, it is not clear whether the Complainant is alleging an independent, or a derivative violation. In all events, however, the Complainant has failed to satisfy the three-pronged test articulated above in Missoula County High School. Furthermore, where an unlawful purpose is not present or cannot be implied as a matter of law, (as in this case) the Court has held that "discrimination" does not violate the Act, even if the employer's conduct is deemed unjustified or unfair. Laidlaw Corp., 171 NLRB 1366, 68 LRRM 1252 (1968). Further, pursuant to Radio Officers v. NLRB, 347 US 17, 33 LRRM 2417 (1954), the Supreme Court explained:

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed. (Radio Officers, supra)

14. Finally, the Defendant contends that even if the hearing examiner finds merit in any of these charges, Alice Green is not entitled to any relief from the school board's April 14, 1993 decision to reduce her contract to 3/7 time because this charge was not filed within 6 months from the date of that decision as required by Section 39-31-404, MCA. In support thereof, they cite U.S. Postal Service, 271 NLRB 61, 116 LRRM 1417 (1984) and IATSE Local 659, 276 NLRB 91, 120 LRRM 1135 (1985), wherein the NLRB held that the six month limitation period commences on the date when the final adverse employment decision is made and communicated, not on the date its consequences become effective. See also, U.S. Postal Service, 285 NLRB 98, 126 LRRM 1138 (1987).

The matter of filing time deadlines was not included in the issues to be addressed by this forum, and specifically delineated herein (See number II. Issues). Notwithstanding, as argued by Complainant, the reduction of

Mrs. Green is a matter properly before the Board of Personnel Appeals. As contended by Complainant, the District failed to present evidence of when or if notice was given to Mrs. Green of its action at its April 14, 1993 meeting. Further, it is is reasonable to conclude, as pointed out by Complainant, that the final adverse employment decision by the District which caused the Roy Education Association to file formal ULP charges was the offer to rehire Renee Kolstad who had been discharged with other union officers. Kolstad, however, was offered a job on May 26, 1993, but as no such offer was extended to union officers, the Complainant felt such action then constituted an unfair labor practice. That date falls within the 6 month filing time frame.

15. With respect to the Section 39-31-401(3), MCA discrimination charge, the Defendant has shown that it never acted with anti-union motive when the decision was made to reduce the number of employees in Fergus County Elementary and High School District No. 74. As argued by Defendant, with the exception of Alice Green, the record does not support the claim that board members even knew that James Lubke or Mary Jane Walker were union officers **at the time** the reduction in force decision was made. It could be argued (but wasn't proffered herein) that under

the so called "small plant doctrine", [See Coral Gables Convalescent Home, 234 NLRB 1198, 97 LRRM 1435 (1978)] it could be inferred, and a conclusion reached that because of the small size of the Roy Schools, Defendant was aware of the affected employees union allegiance. Here, however, as the facts indicate, except for Green, there existed no such awareness at the time the reduction in force decision was made by the Board.

16. Moreover, the overall record indicates that Defendant would have taken the same personnel action regardless of Green's or other REA member's protected activity. The record clearly demonstrates that the Board had a legitimate and substantial business reason for reducing teaching and non-teaching staff due to low and declining enrollment, and the need for fiscal responsibility. These were their sole motivating factors in implementing the actions ultimately affecting the before mentioned employees.

V. **SUMMARY**

Beginning in October, 1992 the school board began a series of discussions over measures to reduce costs, culminating in a February 24, 1993, decision to reduce or eliminate a number of teaching and non-teaching positions. The decision to eliminate or to reduce the hours assigned

to these positions, including the position held by Alice Green, was based strictly on low and declining enrollment and the need for fiscal responsibility.

There is nothing in the record supporting the conclusion that anti-union animus played any role in the decision to reduce positions or to assign Alice Green multiple subjects in a single period. Indeed, such assignments have been the norm in Roy for many years. There is no objective evidence that the Roy School Board ever refused to deal with the president of the Roy Education Association or that it assigned to other teachers courses for which she was more qualified to teach.

Nor does the reliable, probative and substantial evidence on the record support the charge that any board member or administrator of Roy Elementary and High School District No. 74 ever interfered with, restrained or coerced any employees in the exercise of their rights under Section 39-31-201, MCA or that any board member or administrator ever discriminated against employees in regard to their hire or tenure of employment in order to discourage membership in the Roy Education Association.

VI. **RECOMMENDED ORDER**

Based on the findings made above, this matter is **Dismissed** and the relief requested is **Denied.**

SPECIAL NOTICE

Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to A.R.M. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed. If no exceptions are filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Notice of Appeal shall be mailed to:

Board of Personnel Appeals,
Department of Labor and Industry
P.O. Box 1728,
Helena, MT 59624-1728.

DATED this _____ day of December, 1994.

BOARD OF PERSONNEL APPEALS

By:
GORDON D. BRUCE
Hearing Officer

* * * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

J. Dennis Moreen, Esq.
CHRONISTER, DRISCOLL & MOREEN
P.O. Box 1152
Helena, MT 59624

Michael Dahlem, Esq.
Montana School Boards Association
1 South Montana Avenue
Helena, MT 59601

DATED this _____ day of December, 1994.

By: _____